STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2005
v	No. 253300 Cass Circuit Court
TERRELL MICHAEL BLACKAMORE, Defendant-Appellant.	LC No. 03-010217-FH

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant sold four "dime" ($10) bags of marijuana to a confidential informant (CI) for the Cass County Drug Enforcement Team (CDET). Following a jury trial, defendant was convicted of one count of delivery of marijuana, MCL 333.7401(2)(d)(iii), and was sentenced to 30 months' to 8 years' imprisonment. We affirm.

Defendant argues that there was insufficient credible evidence to convict him of selling marijuana to the CI. We disagree. We review challenges to the sufficiency of the evidence in criminal trials de novo to determine whether, in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). Circumstantial evidence and reasonable inferences made therefrom may constitute sufficient evidence to find all of the elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). This Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id.*

In order to prove the crime of delivery of less than fifty grams of marijuana under MCL 333.7401(2)(d)(iii), the prosecutor must demonstrate the following elements beyond a reasonable doubt: (i) that defendant delivered a controlled substance, (ii) that the substance delivered was marijuana, and (iii) that defendant knew he was delivering marijuana. See CJI2d 12.2. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

Defendant contends that the testimony of the CI and Detective Toxopeus, the officer working with the CI, identifying defendant as the person who sold the marijuana to the CI is not credible. Whether identification testimony is credible is a question for the trier of fact to resolve. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). This Court does not sit as "the

thirteenth juror" in assessing the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 638 n 14; 576 NW2d 129 (1998). The evidence at trial established that the CI and Toxopeus both knew defendant before the controlled buy, were able to distinguish him from his twin brother, and identified him during the controlled buy. Further, defendant's testimony that his supplier lives two minutes away and that he had driven his fiancé to Midway Airport for her flight to Las Vegas that morning supports the CI's testimony that defendant left and returned during the controlled buy, and that he told her that he had given or sold the last of his marijuana to a friend that had just left for Las Vegas. We find that this evidence, if believed, was sufficient for a reasonable jury to conclude, beyond a reasonable doubt, that defendant was the individual who sold marijuana to the CI.

Defendant also contends that because he had an alibi, there was insufficient evidence to support his conviction. "The testimony of an alibi witness is to be given weight relative to its content, and it is not always sufficient to create doubt where other substantial evidence is present." *People v Amos*, 10 Mich App 533, 536; 159 NW2d 855 (1968). Moreover, "[i]t is within the jury's province to determine the credibility of all witnesses, including any whose testimony tends to establish an alibi." *People v Diaz*, 98 Mich App 675, 682; 296 NW2d 337 (1980). Here, the record shows that defendant's alibi witnesses were uncertain of the time that they saw him, and the prosecutor attacked their credibility. The jury obviously found that the prosecution's witnesses were credible and defendant's alibi witnesses were not credible, which was the jury's role. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Viewing the evidence presented in the light most favorable to the prosecution, we find that a rational trier of fact could be persuaded that the essential elements of the crime charged were proven beyond a reasonable doubt.

Defendant next argues that the trial court erred in not allowing the jury to view the Cherry Street house from Toxopeus' vantage point because the photographic and measurement evidence was insufficient to show that Toxopeus was too far away to identify defendant. We disagree. Defendant filed a pre-trial motion for a jury view, which the trial court denied, and did not renew the motion at trial, although he was invited to do so. Thus, this issue is unpreserved, and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

MCL 768.28 and MCR 6.414(D) both permit a trial court to allow the jury to visit a place where an event connected with the crime occurred. *People v Herndon*, 246 Mich App 371, 418; 633 NW2d 376 (2001). Granting a motion for a jury view is proper when it is believed that a personal view of the scene would enable the jurors to comprehend more clearly the evidence already received. *People v Curry*, 49 Mich App 64, 67; 211 NW2d 254 (1973). We find that a jury view was unnecessary and would not have affected the outcome of the trial. The record shows that defendant's primary purpose for the jury view, to impeach Toxopeus' testimony about his distance from the house, was extinguished by his testimony that his measured distance from the Cherry Street house was 149 yards away. Because photographs and diagrams were also admitted into evidence, we find that a jury view would have been cumulative.

Defendant next raises several claims of prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct is decided

case by case, and this Court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id*. at 272-273. The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*.

Preserved claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Defendant did not preserve several of his challenges to the prosecutor's conduct. Where a defendant fails to object to an alleged instance of prosecutorial misconduct, we review the issue for plain error. *Carines, supra* at 752-753, 764. To prevail, defendant must demonstrate plain error that affected his substantial rights in that they affected the outcome of the proceedings. *Id*. at 763.

Defendant argues that the prosecutor elicited several pieces of irrelevant and highly prejudicial information. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Defendant has waived appellate review of the prosecutor's questions regarding the name of defendant's parole officer and defendant being unmarried and having a child because this testimony was initially elicited from defendant on direct examination. Any error requiring reversal may not be based upon an error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Additionally, the record shows that testimony regarding where defendant stayed was properly elicited on cross-examination because defendant testified on direct examination that staying anywhere besides his known address violated his parole.

The testimony that the CI was suffering from a high-risk pregnancy was irrelevant to the present case because it does not throw light on any material point at issue. *Aldrich, supra* at 114. However, we find that any error was cured by the trial court's instruction to the jurors not to let sympathy or prejudice influence their decision. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, "the trial court's instructions eliminated any possible unfair prejudice." *People v Houston*, 261 Mich App 463, 470; 683 NW2d 192 (2004). Thus, defendant cannot meet his burden of showing that this testimony seriously affected the fairness, integrity, or public reputation of the proceedings. *Carines, supra* at 763-764.

Defendant contends that Toxopeus' testimony that he knew defendant and had seen him before at 108 Cherry implied that defendant was under investigation for other activities. We find that the testimony was relevant and admissible to show defendant's identity, and was highly probative given that Toxopeus testified that during the controlled buy he saw defendant leave the house and return a short while later. Thus, defendant's argument fails.

Defendant next argues that the testimony elicited regarding his marijuana usage and the frequency of his usage, the name and location of his supplier, and the fact that he did not report his marijuana usage to his parole officer was improperly elicited by the prosecutor because he did not give notice under MRE 404(b), and the evidence is irrelevant and highly prejudicial.

MRE 404(b)(1) renders evidence of other crimes, wrongs, or acts inadmissible when offered to prove a person's character to show that they acted in conformity with that character. First, defendant waived appellate review of his testimony that he used marijuana because he volunteered that information while testifying; the prosecutor asked him whether he had *possessed* marijuana, and he replied, "[p]ersonal use, yes." *Griffin, supra* at 46. Second, with regard to the frequency of defendant's drug use and the name and location of defendant's supplier, a jury "is entitled to hear the 'complete story' of the matter in issue." *Aldrich, supra* at 115. In this regard, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Evidence of other criminal acts is admissible when so closely connected with the crime of which defendant is accused as to constitute an explanation of the circumstances of the crime. *Id*. at 742. We find that the contested evidence was relevant and highly probative because it helped put defendant's actions during the controlled buy into context. Therefore, the testimony at issue is not subject to analysis under MRE 404(b) and is not improper on the ground that it was other acts evidence.

Third, the fact that defendant did not report his marijuana use to his parole officer was admissible under MRE 608 to attack defendant's credibility. MRE 608(b) allows inquiry on cross-examination into specific instances of a witness' conduct to either attack or support the witness' credibility, if the inquiry concerns the witness' character for truthfulness or untruthfulness. Defendant testified that he did not report his marijuana use in October or November, but had to report it in December because he tested positive for it. This testimony is directly related to defendant's character for truthfulness or untruthfulness.

Defendant also argues that the prosecutor argued facts that were not in evidence during his closing argument. "Generally, 'prosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id.* (alteration original). In the instant case, the prosecutor argued that defendant freely admitted other crimes because he knew he would not be charged with them, that Toxopeus could identify people from a distance of 150 yards, that defendant formulated his testimony about taking his girlfriend to the airport "that morning," and that defendant was willing to lie to anybody on the street. The record shows that each of these comments was either relevant and supported by the evidence, a proper inference from the evidence, or a proper response to defense counsel's arguments. Furthermore, the trial court's instruction to the jury that the statements of the attorneys are not evidence dispelled any possible unfair prejudice from these remarks. *Houston, supra* at 470.

Defendant also argues that the prosecutor improperly expressed a personal belief in the facts of the case by arguing that the CI was telling the truth. A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id*. at 276. However, a prosecutor is allowed to comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and

the question of the defendant's guilt depends on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, the prosecutor's statements neither implied special knowledge nor used the prestige of his office to his advantage. We find no error.

Defendant next argues that the prosecutor denigrated the defense by stating during his rebuttal argument that the defense was using a "little ploy" and leading the jury on a "goose chase." A prosecutor may not question a defense counsel's veracity, or suggest that defense counsel intentionally sought to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). The prosecutor's remarks about defense counsel's use of a "little ploy" and suggestion that defense counsel was leading the jury on a "goose chase" were improper. However, we will reverse for improper remarks from the prosecutor only if a curative instruction could not have eliminated the prejudicial effect of the improper remarks. *People v Green,* 228 Mich App 684, 693; 520 NW2d 444 (1998). The record shows that the trial court instructed the jury that statements made by attorneys are not evidence. Further, the prosecutor's statements were isolated, unlike the repeated improper conduct of the prosecutors in *People v Bairefoot,* 117 Mich App 225; 323 NW2d 302 (1982), and *People v Dalessandro*, 165 Mich App 569; 419 NW2d 609 (1988), wherein this Court determined that reversal was required. Therefore, any error is harmless and did not affect defendant's right to a fair trial. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

Defendant also argues that the prosecutor's comments that defendant was playing a "shell game," and that defendant played a game on the streets and wanted to play one at trial, were improper. We find these comments to be within the scope of the wide latitude that prosecutors are given regarding their arguments and conduct. *Bahoda, supra* at 282. Prosecutors are not required to make their arguments in the blandest possible terms. *Aldrich, supra* at 112.

Defendant next argues that the prosecutor asked for a sympathetic or "civic duty" verdict from the jury by stating, "[i]n conclusion, a hundred years from now if someone wants to know the truth about what happened out there on that date and that time, they will look to your verdict. Let that verdict reflect the truth." Defense counsel objected to this statement at trial, and the trial court sustained the objection, telling the prosecutor to "avoid that argument." A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282. Here, the prosecutor's argument did not constitute an improper appeal to the jury's civic duty because it merely urged the jurors to find the truth, not to convict as part of their civic duty. Therefore, the prosecutor's argument did not deny defendant a fair trial. *Abraham, supra* at 280.

Defendant next argues that MCL 769.34(10) is unconstitutional. We disagree. We review this unpreserved, constitutional issue for plain error affecting defendant's substantial rights. *Carines, supra* at 774.

MCL 769.34(10) provides, in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining defendant's sentence.

Defendant contends that MCL 769.34(10) violates separation of powers, interferes with the judicial function, violates a defendant's constitutional right to an appeal, and violates the due process clauses of Michigan and the United States Constitutions. We note that "the federal constitution does not require the fifty states to provide any appeal whatsoever to criminal defendants." *People v Bulger*, 462 Mich 495, 511; 614 NW2d 103 (2000) (citations omitted). Statutes are presumed to be constitutional, and courts must construe them as constitutional unless their unconstitutionality is evident. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). The party challenging the statute has the burden of proving unconstitutionality. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002).

Defendant has not met his burden of proving that MCL 769.34(10) is unconstitutional. In *People v Garza*, 469 Mich 431, 435; 670 NW2d 622 (2003), our Supreme Court ruled that the first sentence of MCL 769.34(10) is constitutional. Defendant's argument that the Legislature is exercising judicial power through MCL 769.34(10) and interfering with the function of the Court of Appeals lacks merit because Const 1963, art 3, § 2 provides that the branches of government can exercise the powers *expressly* bestowed upon them by the constitution. Our Supreme Court recognized this in *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001):

> The ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. Const 1963, art 4, § 45. The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary. See, e.g., MCL 769.1(1). [Footnote omitted.]

MCL 769.34(10) does not violate the separation of powers doctrine because the statute is an expression of a power that the state constitution originally vested in the legislative branch of government, rather than the judicial branch. Defendant's argument that MCL 769.34(10) violates procedural and substantive due process, therefore, fails.

In addition, MCL 769.34(10) does not violate a defendant's right to an appeal. Although the first sentence of MCL 769.34(10) precludes appellate review of the proportionality of a sentence imposed within the guidelines, review of that sentence is not completely barred because the statute specifically provides for appellate review of the scoring of the sentencing guidelines and the accuracy of the information relied upon in determining the sentence.

Defendant also argues that he is entitled to resentencing because the trial court gave "inappropriate emphasis" to his prior record. We disagree. Defendant's sentence was within the minimum sentencing guidelines; therefore, under MCL 769.34(10), this Court must affirm defendant's sentence absent an error in scoring the sentencing guidelines or reliance upon inaccurate information in sentencing defendant. Therefore, defendant's argument that his sentence was disproportionate also lacks merit.

Finally, defendant argues that his counsel provided ineffective assistance if this Court would have reversed on any of the errors asserted in Issues I-IV, *supra*, but for defense counsel's failure to preserve the issue for appeal. We find that this argument lacks merit. A review of the

record does not support a finding that defense counsel rendered ineffective assistance of counsel during trial. *People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot